

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Ashok Vs. State of Rajasthan

S.B.CRIMINAL APPEAL NO.394/1988
against the judgment dt.25.8.88 passed by
the Additional Sessions Judge, Barmer,
in Sessions Case No.28/1988

Date of Judgment: November 23, 2007

P R E S E N T

HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.Suresh Kumbhat, for the appellant.
Mr.J.P.S.Choudhary, Public Prosecutor.

BY THE COURT:

1. This is an appeal directed against the judgment of the learned Additional Sessions Judge, Barmer, dated 25.8.1988, whereby he convicted the accused appellant Ashok for the offence under section 20 (ii) of the N.D.P.S.Act, 1985, hereinafter referred-to as "the Act" and sentenced him to undergo 20 years' rigorous imprisonment and to pay a fine of Rs.2,00,000/- and in default, to further undergo two years' R.I.

2. The charge against the accused was that on 15.8.1987 at 10.45 P.M., during search by the S.H.O., Gudamalani, District Barmer, six packets of Charas measuring 6 kgms. were found in the brief case of accused appellant in a bus plying from Barmer to Ahmedabad, which was checked near Gandhav. After doing formalities of taking samples etc., the sealed samples were sent for chemical examination and on microscopic examination, the samples contained in the packet were found to be of Charas. After investigation, the accused was charged accordingly to which he pleaded not guilty. The prosecution examined eight witnesses. The statement of accused was recorded under Section 313 CrPC. He produced Narayan Singh in his defence. After hearing the arguments, the learned Judge convicted and sentenced the accused appellant as indicated above.

3. It has been contended by the learned counsel for the

appellant that in this case, neither compliance of Section 42 of the Act has been made nor the information was sent to the superior officers nor recovered articles were produced in the Court, therefore, this case is hit by Sections 42, 55 and 57 of the Act, for which the accused is entitled to be benefited by way of acquittal.

4. On the contrary, learned Public Prosecutor submitted that non-compliance of the provisions of the Act is not mandatory but it is directory and the conviction has rightly been recorded by the learned trial Judge.

5. The most important witness of recovery in this case is Padam Singh, SHO (PW 8), who has stated in the examination in chief that upon getting a secret information on 15.8.1987 that accused Ashok is carrying Charas in a bus from Barmer to Ahmedabad. He made an entry to this effect in Rojnamcha Ex.P.11 and by taking motbirs Moda Ram and Peer Singh, he reached at Police Outpost Gandhav and waited for the bus. At about 10.45 PM, when the bus reached, he conducted search of the bus. Accused appellant was sitting on the rear seat of the driver with one brief case. Upon asking, he was unable to reply and did not provide key to the suit case, upon which the suit case was snatched and it was opened. Six packets of Charas were found in it. He sealed 5.700 kgms. of Charas separately

and 30 gms. of Charas, separately sealed, was sent for chemical examination and he prepared recovery memo Ex.P.1. The accused was arrested. Recovered articles were deposited in the Malkhana and the sample was sent for chemical examination in the office of the Superintendent of Police, Barmer vide Ex.P.14. The Chemical report is Ex.P.15. After recording the statement, he filed chargesheet against the accused.

6. From the perusal of this statement of the recovery officer, it appears that he has not made any compliance of ss.42 and 57 of the Act, which says that on recovery of any drug articles under the act, he shall inform to the immediate official superior to him about the information regarding commission of offence u/s.42 of the Act and shall also send full report of all the particulars of arrest and seizure to his superior officer under Section 57 of the Act. Nowhere, the S.H.O. has said in his statement that he complied with these mandatory provisions of Sections 42 and 57 of the Act. Even in the cross examination, he has said that he did not enter the information separately but he entered it in the Rojnamcha report only. The conductor and driver viz; Dala Bhai and Faiz Mohd, PW 5 and PW 6 respectively, are hostile witnesses like Ajod Prasad (PW 7), who has also not supported the prosecution story.

7. The statement of recovery officer has ofcourse been supported by Head Constable Bhera Ram. He has also proved copy of the Malkhana Register Ex.P.5 and stated that recovered articles remained in the Malkhana of the Police Station between 16.8.87 to 24.8.87 and thereafter the sample was sent to the S.P.Office through F.C.Narna Ram for chemical examination vide Ex.P.6. Jethu Singh (PW 2) and Narna Ram (PW 3) are the witnesses of Malkhana samples. Independent witness Moda Ram (PW 1) has proved recovery memo Ex.P.1 but in the cross examination, he has said that he did not notice Charas. He has denied portions 'A to B', 'C to D', 'E to F' and 'G to H' of Ex.D.1 recorded u/s.161 CrPC, wherein it has been stated that conductor was Dala Bhai and driver was Faiz Mohd. and also about recovery of Charas. Therefore, the testimony of recovery is of no help to the prosecution.

8. Now remains the evidence of only police officer but the recovered Charas, out of which 5.770 kgms. was kept in the Malkhana of Police Station, Gudamalani and thereafter handed over to the Custom Department, has not been produced in the Court. When the recovered articles have not been produced in the court, the compliance of Section 55 of the Act has also not been made. In support of his contention, learned counsel for the appellant has placed reliance on a decision of the Supreme Court

in Jitendra and another vs. State of M.P. Reported in 2004 SCC (Cri) 2028, in which it has been held as under:

“In the trial, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.”

9. The non-production of the recovered articles which is the basic proof of commission of offence, can be termed not only a procedural irregularity under Sec.465 CrPC as held by the Hon'ble Supreme Court in Jitendra's case (supra) but also, it is fatal to the prosecution with regard to establishing the identity of a thing, which is relevant in the case. This identification is termed as an exception to the general rule of hearsay evidence because by virtue of Section 9 of the Indian Evidence Act, the facts necessary to establish the identity of a thing, are relevant in so far as they are necessary for that purpose. In this case, the relevant fact is the recovery of 5.770 kgms. of Charas but the same has not been produced in the Court, then the presumption which the Court will take is that it will be unfavourable to the prosecution as it has withheld it. This is the law based on

illustration (g) of Section 114 of the Indian Evidence Act which says that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

10. Thus, from the above discussion, it appears that the prosecution has failed to comply with the provisions of Sections 42, 55 & 57 of the Act for which the accused is entitled to be benefited.

11. Consequently, this appeal is allowed. The judgment of the learned Additional Sessions Judge, Barmer, dated 25.8.1988, convicting appellant Ashok for the offence under section 20(ii) of the Act and sentencing him to undergo 20 years' rigorous imprisonment and to pay a fine of Rs.2,00,000/-, is set aside. He is on bail, as such, his bail bonds stand cancelled.

(DEO NARAYAN THANVI), J.

RANKAWAT JK, PS